1978

the State of Utah v. Brent Leslie Dock : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff	:	
v.	:	
BRENT LESLIE DOCK, Defendant	:	Case No. 15503

BRIEF OF APPELLANT

Appeal from the judgment and conviction rendered by the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable G. Hal Taylor, Judge presiding.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of assault by a prisoner, a third degree felony, Utah Code Ann. §76-5-102.5 (1953 as amended), in the Third District Court in and for Salt Lake County, State of Utah, the Honorable G. Hal Taylor, presiding.

DISPOSITION IN THE LOWER COURT

Appellant, Brent Leslie Dock, was charged by information with aggravated assault by a prisoner, Utah Code Ann. §76-5-103.5 (1953 as amended) a second degree felony. On October 13, 1977, he was convicted by a jury of the lesser included offense of (simple) assault by a prisoner in violation of Utah Code Ann. §76-5-102.5 (1953 as amended). The defendant was sentenced by the court on

October 21, 1977, to serve not more than five years in the Utah State Prison, the indeterminate term of imprisonment which is provided by law. This sentence was to be served consecutively with the term he was then serving.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment of guilt entered against him and a new trial.

STATEMENT OF THE FACTS

The facts adduced at trial were conflicting, however, the various witnesses for the parties testified as follows:

At approximately 6:10 a.m. on January 29, 1977, Brent Leslie Dock, a prisoner confined in medium security, cell #A-314 at the Utah State Prison was awakened by Jack Manneh, a correctional Sergeant, and informed that he was being transferred to maximum security at the prison (T.7).

Manneh testified at trial that he came on duty at 6 o'clock that morning and was called by his supervisor to transfer inmate Dock to maximum security (T.19). He told Dock that he was being moved to maximum security for throwing a coke can at Officer Morrell earlier that day (T.24). Dock denied hitting the officer with the coke can, but Manneh proceeded to transport the prisoner anyway (T.39).

Officer Morrell, a correctional guard at the prison opened the door of Dock's cell to facilitate transport. Manneh reported

that after the door was opened, he proceeded to walk away from appellant's cell down the hallway to maximum security. He heard a crash and testified that he was attacked by Dock with a peanut butter jar (T.26-27), which resulted in a struggle. Officer Wells, another correctional officer at the prison aided Manneh and transported Dock downstairs (T.29). Officer Manneh, not seriously injured, was treated for minor wounds at the prison hospital and worked the rest of his shift that day (T.30,45).

Donald F. Morrell testified that he and the appellant had had an argument earlier that day, January 29th. He was working the 12:00 p.m. to 8:00 a.m. shift and was making the routine block count when he accidently kicked a can that was on the tier of the third deck. As he was coming back down the tier, Morrell reported that he was hit in the back of his right leg with a coke can (T.81). He stated that Dock said he didn't like him kicking the can in front of his "house" (cell). As a result, the officer informed Dock that this incident would be written up (T.82-83).

James A. Wells, another correctional officer at the Utah State Prison, testified that he was working the 6:00 a.m. to 2:00 p.m. shift that day and was ordered to go to "A" Block with Officer Manneh. Officer Morrell was at the control panel at this time (T.86-88). Wells stated that Manneh informed inmate Dock that he was being transported to maximum security. Manneh told Morrell to open the door and Wells reported that a struggle between Dock and

Manneh resulted. Wells did not see Dock hit Manneh (T.89-91,99) and testified that Dock was apparently upset at the thought of being moved to maximum security (T.101).

The Appellant, Brent Dock, testified that on January 28th he had been working in the prison print shop in medium security all day. He stated that he returned to his cell about 6:00 p.m. on that day and was very tired from working. He testified that about 3:00 a.m. on the morning of January 29th he had a discussion with Officer Morrell. The officer had kicked a coke can in front of his cell and Dock testified that he picked up the can and threw it over the tier. Morrell came back to Dock's cell and accused him of throwing the coke can at him (T.67-69).

Dock further testified that about 6:00 a.m. some other officers awakened him, attempting to come into his cell. Dock stated that he was scared that the officers were going to come in and beat him up and that Manneh proceeded to pull him out of his cell and appellant testified that the officer apparently slipped and hit his head. Dock denied having any peanut butter jar in his cell and stated the only thing he felt at that point was fear that they would use force to take him to maximum security (T.71-73). No peanut butter jar or pieces therefrom were presented as evidence at trial by the State.

Appellant stated that it was dark in the hallway and the lights were off in his cell. He wasn't informed that he was going to maximum security prior to this pre-dawn visit although informing the accused was routine prison procedure. The appellant.

Dock, maintains that he did nothing to warrant being transported to maximum security although he has remained at that more restrictive location since the time of this incident (T.74-75).

At trial, appellant, through counsel, excepted to several of the trial court's jury instructions. Specific exception was made to the court's "Aggravated Assault by a Prisoner" elements Instruction No. 11 since a crucial element, the mens rea, or intent, was lacking (T.108).

Exception also was taken to the trial court's Instruction No. 20 which defined the lesser included offense of Assault by a Prisoner for the failure of the Court to include the crucial element of intent. (T.109 and 111)

The failure of the Court to give proposed defense instructions offered by the appellant, No. 12-17 on self defense and defense of habitation was similarly excepted to on the basis that the court should have instructed on those defenses since proper evidence was presented raising those issues for the consideration of the trier of fact (T.110-111).

ARGUMENT

POINT I

APPELLANT'S REQUEST FOR REVERSAL OF HIS CONVICTION AND NEW TRIAL SHOULD BE GRANTED SINCE THE COURT FAILED TO INSTRUCT ON THE SPECIFIC MENS REA OR "INTENT" REQUIRED UNDER THE UTAH AGGRAVATED ASSAULT BY A PRISONER AND ASSAULT BY A PRISONER STATUTES.

A fundamental principle of substantive criminal law requires a specific mental state or mens rea in order to be convicted

of a particular crime. The totality of conduct, mental fault, plus attendant circumstances when required by the definition of the crime make up the "elements". La Fave and Scott, Handbook on Criminal Law, Section 2 (1972 at 8). Therefore, one of the basic premises of the criminal law is that for criminal responsibility to attach, the mens rea or particular state of mind must be present to bring about the consequences set forth in the crime charged.

The Criminal Code for the State of Utah enacted in 197 specifically embodies this basic principle of substantive criminal law in Utah Code Ann. §76-2-101 (1953 as amended) wherein it is stated:

> Requirements of criminal conduct and criminal responsibility. — No person is guilty of an offense unless his conduct is prohibited by law and:
>
> (1) He acts intentionally, knowingly, recklessly or with criminal negligence with respect to each elem of the offense as the definition of the offense requires; or
>
> (2) His acts constitute an offense involving strict liability. (Emphasis Supplied)

Also Utah Code Ann. §76-2-102 (1953 as amended) provid

> Culpable mental state required— Strict liability. — Every offense not involving strict liability shall require a culpable mental state, and when the definitio of the offense does not specify a culpable mental state, intent, knowledge, or recklessness shall suffic to establish criminal responsibility. An offense shal involve strict liability only when a statute defining the offense clearly indicates a legislative purpose to impose strict liability for the conduct by use of the phrase "strict liability" or other terms of similar import. (Emphasis Supplied)

Counsel for appellant took specific exception to the trial court's failure to instruct on the crucial element of intent making specific reference to the aforementioned statutes (T.108). Appellant, through counsel, offered proper instructions embracing the proper elements of both Aggravated Assault by a Prisoner and (simple) Assault by a Prisoner.[1] (T.108-111)

A. (SIMPLE) ASSAULT BY A PRISONER

The Appellant was convicted of Assault by a Prisoner a lesser included offense of Aggravated Assault by a Prisoner as charged in the Information. The trial court's error in failing to properly define the elements of the lesser included offense is error which requires reversal of Appellant's conviction.

Assault by a prisoner requires a specific intent or mens rea as an element of that offense. Utah Code Ann. §76-5-102.5 (1953 as amended) provides in its entirety:

> Any prisoner who commits assault, intending to cause bodily injury is guilty of a felony of the third degree. (Emphasis Supplied).

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1. Proper exception was therefore taken to the trial Court's instructions by appellant under Rule 59 Utah Rules of Civil Procedure; Utah Code Ann. §77-37-1 (1953 as amended), and Rule 5.4, Rules of Practice in the District Court, preserving the issue for appeal before this Court.

It is this basic element of intent which the trial court refused to include in the charge to the jury in Instruction No. 20. The Court's instruction stated in pertinent part:

INSTRUCTION NO. 20

> Before you can convict the defendant of the crime of Assault by a Prisoner, the lesser offense included in the crime of Aggravated Assault by a Prisoner charged in the Information on file in this case, you must believe from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:
>
> 1. That on or about the 29th day of January, 1977, within the corporate limits of Salt Lake County, the defendant Brent Leslie Dock assaulted Manneh;
>
> 2. Said defendant was then and there a prisoner. . .

The appellant made timely request for the inclusion of the crucial element of intent in defendant's proposed Instruction No. 19. This instruction set out the elements of the lesser included offense as follows:

> 1. That on or about the 29th day of January, 1977, in Salt Lake County, State of Utah, the defendant, BRENT LESLIE DOCK, did attempt, with unlawful force or violence to do bodily injury to Jack Manneh.
>
> 2. That BRENT LESLIE DOCK was then and there confined in the Utah State Prison.
>
> 3. That said Assault was accomplished intentionally.

For a person to be found criminally responsible, the court must instruct the jury on the essential elements of the crime charged. The State has the burden of proving each and every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S. 1068, 25 L. Ed. 2d 368 (1970). When plain error is evident on the face of the record, i.e., failure to instruct on the mens rea required for a particular crime, this court must reverse the trial court and grant a new trial to remedy the error. State v. Waid, 9

297, 67 P.2d 647 (1937).

The trial judge bears a particularly heavy responsibility to correctly charge the jury as to the essential elements of the offense, even in the absence of an objection or a request by counsel. Thus, as one court has stated:

> "Just as an indictment which omits an essential element of the crime charged must be dismissed as fatally defective the trial judge's failure here to instruct the jury on all the essential elements of the crime in counts two and four even though not requested, was plain error." United States v. Musgrave, 444 F.2d 755, 764 (5th Cir. 1971). Accord: Green v. United States, 405 F.2d 1363, 1370 (D.C. Cir. 1968)

Case law in Utah supports the proposition that the current assault and aggravated assault statutes, amended in 1974, retained the mental element of specific intent that was required under the former assault statute. Hence, the failure of the trial court to instruct on the mens rea element becomes plain error, particularly as in the instant case wherein a proper instruction was requested by appellant.

In State v. Potello, 42 Utah 396, 132 P.14 (1913), defendant was convicted of an assault under the former Utah assault statute, Utah Code Ann. §76-7-6 (1953 repealed) which provided:

> "Every person who, with intent to do bodily harm and without just cause or excuse, or when no considerable provocation appears, or when the circumstances show an abandoned or "malignant heart", commits an assault upon the person of another with a deadly weapon, instrument or other thing is punishable by imprisonment in the state prison not exceeding five years, or by fine not exceeding $1,000 or by both." (Emphasis Supplied)

This Court held that "intent to do bodily harm is the very essence of the offense and it must be proved as alleged." (132 P.14 at 15).

Similarly, the intent required under the percursor of the new code's (simple) assault by a prisoner statute was discussed in State v. Nemier, 106 Utah 307, 148 P.2d 327 (1944). In that case defendant was an inmate at the Utah State Prison and was charged with an assault upon prison guards. The mens rea of "malice" under the former Utah statute, was construed as requiring more "than a mere wish to vex or annoy the person assaulted." (148 P.2d at 331)

Furthermore, the so-called simple assault statute is a lesser included offense of the aggravated assault statute and requires a specific intent as the mental element of that crime. State v. Nielsen, 30 U.2d 119, 514 P.2d 535 (1972).

The appellant appropriately submitted the proposed jury instructions to the trial court on the elements of aggravated assault and simple assault under the Utah statutes. These instructions defined the necessary elements of aggravated assault and the lesser included offense of simple assault which requires the mental element

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2. More recently, the 10th Circuit Court of Appeals followed the holding of the Potello case requiring proof of intent to be convicted under the old felony statute Green v. Turner, 409 F. 2d 215 (10th Cir. 1969).

of "intent" to cause serious bodily injury to another. The instructions given by the court failed to set forth the mens rea or intent requirement under those statutes. As a result the court's instruction failed to meet even the threshold requirement of substantive criminal law, since the court failed to instruct on all of the essential elements of the crime under the Utah statutes. This was clearly prejudicial to the appellant since the jury was not made aware of the mental element required in order for criminal responsibility to attach.

The thrust of the argument of defense counsel at trial was that under the circumstances, the state had failed to prove that the appellant "intentionally" struck Officer Manneh, if he struck him at all.

The failure of the Court to include the intent as an element of the offense in the instructions could have led the jury to believe that intent was not an element and that the burden of proof did not rest on the State to prove the culpable mens rea beyond a reasonable doubt; or stated differently, the jury could conceivably have believed that aggravated assault by a prisoner and assault by a prisoner are strict liability offenses. Utah Code Ann. §76-2-101, 102 (1953 as amended) however, show that such is not the law in the State of Utah.

Other jurisdictions have recognized that it is "plain" error to refuse to instruct the jury on the essential elements of a statutory criminal offense. In State v. Johnson, 221 Wis. 444,

453-455, 267 N.W. 14, 18 (1936), the defendant was charged with armed robbery under a statute which required a finding of "intent, if resisted, to kill or maim the person robbed." The trial court did not instruct the jury that it was required to find such intent. The Supreme Court of Wisconsin held this failure reversible error.[3]

In United States v. Bryant, 461 F.2d 912 (6th Cir. 1972) the court reversed the defendant's conviction for aiding and abetting the violation of certain federal revenue laws. The trial court had failed to instruct on the requisite mental state for conviction under the Federal Act, and the court noted the fatal significance of such failure.

> . . . specific criminal intent is an element of the offense of aiding and abetting, and "[w]here intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." Morisette v. United States, 342 U.S. 246 274, 72 S. Ct. 240, 255, 9 L.Ed. 288 (1952). Many criminal statutes expressly include the requirement that the accused specifically intend to have performed a particular criminal act. See, e.g., 18 U.S. C. §2114. Many others, however, such as the aiding and abetting statute, do not, even though specific intent is an element of the offense. In either case, the jury must be charged fully and accurately on intent. See Morissette v. United States, supra;

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3. Accord: People v. Davis, 74 Ill. App. 2d 450, 221 N.E. 2d 63 (1966); Commonwealth v. Tracey, 137 Pa. Super 221, 8 A.2d 622, 625 (1939); Brook v. State, Okla., 115 P. 1026 (1911).

United States v. Bryant, 137 U.S. App. D.C. 124, 420 F.2d 1327, 1333 (1969); Bradley v. United States, 136 U.S. App. D.C. 420 F.2d 181, 188 (1969); Findley v. United States, 362 F.2d 921 (10th Cir. 1966); Jackson v. United States, 121 U.S. App. D.C. 160, 348 F.2d 772 (1965); 2 C. Wright, supra, §487, at 302. Intent, like willfulness or premeditation, is a subjective element the existence of which usually must be inferred from evidence of overt acts, but if the jury is not instructed that intent must be found to have existed, the danger is great that a conviction may result on the basis of overt acts alone. . . The possibility that substantial prejudice resulted to appellant from the court's omission of an instruction on intent is sufficient to require reversal. See United States v. Rybicki, supra 403 F.2d at 604; Jackson v. United States, supra (461 F.2d 920-21).[4]

B. AGGRAVATED ASSAULT BY A PRISONER

Although the Appellant was convicted of the lesser included offense of Assault by a Prisoner at trial, the trial court's failure to instruct the jury on the crucial mental element of "intent" required for the more serious crime was error which requires reversal of Appellant's conviction.

Aggravated assault has been recognized in modern times by legislatures as a more serious criminal offense than simple assault or battery. As a result statutes have been worded various ways to

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4. Accord: United States v. Alsondo, 486 F.2d 1339, 1334 (2d Cir. 1973) United States v. Thomas, 459 F.2d 172, 1177 (D.C. Cir. 1972); and Screws v. United States, 325 U.S. 91, 106-107 (1944).

attach criminal responsibility. The Utah Statute on Aggravated Assault by a Prisoner, Utah Code Ann. §76-5-103.5 (1953 as amended) specifically requires the mens rea of "intent" to cause bodily injury as an essential element of that crime. Therefore, in order to be convicted under that statute, the Utah legislature required a specific intent for criminal responsibility to attach.

The elements Instruction No. 11, given by the Court on Aggravated Assault by a Prisoner stated the elements in pertinent part as follows:

> . . . (1) That on or about the 29th day of January, 19[illegible] within the corporate limits of Salt Lake County, the defendant, Brent Leslie Dock, assaulted J. Manneh;
> (2) That said defendant then and there used a deadly weapon; and,
> (3) Said defendant was then and there a prisoner[illegible]

The new aggravated assault statute, Utah Code Ann. §76-5-[illegible] (1953 as amended) was recently construed by the Utah Supreme Court in State v. Howell, Utah 554 P.2d 1326 (1976). The statute provides:

> . . . (1) A person commits aggravated assault if he commits assault defined in Section 76-5-102 and:
> (a) He intentionally causes serious bodily injury to another; or
> (b) He uses a deadly weapon or such means or force likely to produce death or serious bodily injury.
> (2) Aggravated assault is a felony of the third [illegible]

In that case defendant was convicted of an aggravated assault which arose out of a pool game between two close friends.

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5. The appellant's requested elements instruction on aggravated assault (Defendant's Request No. 2) stated in pertinent part:

". . . (1) That on or about the 29th day of January, 1977, in Salt Lake County, State of Utah, the defendant, Brent Leslie Dock, did use a deadly weapon upon the person of Jack Manneh with such means or force making it likely to produce death or serious bodily injury.

(2) That said Brent Leslie Dock was then and there confined in the Utah State Prison.

(3) That said assault was accomplished by the use of unlawful force and violence and intentionally . . ." (Emphasis Supplied)

The defendant, Howell's brief focused on part "a" of the statute which requires "intent to cause serious bodily injury to another". The defendant's defense was lack of specific intent. The State's brief focused on part "b" of the statute which requires "use of a deadly weapon or such means or force likely to produce death or serious bodily injury." The State claimed that a mere general intent or awareness was required.

The Court affirmed the defendant's conviction in that case based on an "inferred" intent. Nevertheless, the court concluded that each party correctly construed the statute and held that part "a" of the statute requires a specific intent.

In the present case, appellant was charged by Information under part "a" of the aggravated assault statute which requires a specific intent as an essential element of the offense. Based on the reasoning of Howell, in order for the appellant to be criminally responsible the mens rea must be present and the court is dutybound to instruct on the specific intent.

The Howell case suggests that the mens rea required is an intent to inflict great bodily injury. The legislature has manifest a policy under the new aggravated assault statute in requiring a more serious mental element than a mere general intent. By amending the old assault statute to require an aggravated circumstance, the specific intent requirement is clearly retained. Additionally,

appellant was charged under the subsection of the statute which specifically requires "intent" to cause serious bodily injury. Therefore, failure of the trial court to give the requested instruct on the elements of the crime under which appellant was charged was clearly prejudicial. Furthermore, the conviction of assault by a prisoner was improper since it is a lesser included offense of aggravated assault by a prisoner, and the trial court's failure to properly instruct on the necessary mental element of either offense could not help but lead the jury to believe that no culpable mental state was required for conviction of either offense.

The history of the assault statute amended in 1974, evidences the legislative intent to retain a "specific intent" as the essential mens rea that was required under the old Utah felon statute. In the instant case, appellant was charged by information under the current felony statute with the crime of aggravated assaul by a prisoner by use of a deadly weapon, Utah Code Ann. §76-5-103.4 (1953 as amended), to-wit: A broken coffee bottle with intent to cause serious bodily injury to the said J. Manneh and while said Bren Leslie Dock was confined as a prisoner in the Utah State Prison." Clearly, the new statutes have retained the specific intent requireme of Potello and Nemier, under the old felony statute which has been construed as requiring "malice" or something more than a mere wish to annoy. Under the new code, the legislature eliminated the

listinction between assault and battery and has adopted the aggravated ssault statute, recognizing a more serious crime than the so-called imple assault under the old statute. As a result of the more serious ature of the crime under the new statute, the legislature has etained a specific intent in order for criminal responsibility to ttach and merely substituted "intent" for "malignant heart" as he required mens rea.

The failure to instruct on the intent requirement under the ggravated Assault by a Prisoner statute and the failure of the rial court to instruct on "intent" element of (simple) assault y a prisoner statute in effect directed a verdict for the State on his crucial element. In a criminal case this is not only plain rror, but error of constitutional significance and a denial of due rocess of law under the Fourteenth Amendment to the United States onstitution and Article One, Section Seven of the Constitution of Utah. The appellant's right to a trial by jury is also abrogated when the trial court in effect indicates that one of the elements of an offense has been established. Sixth Amendment to the United States Constitution and Article I Section 10 of the Constitution of Utah. See State v. Estrada, 119 U. 339, 227 P.2d 247 (1951). In re linship, supra. United States v. Skinner, 437 F.2d 164, 165 (5th Cir. 971) and United States v. Alessio, 439 F.2d 803, 804 (1st Cir. 1971).

The erroneous instructions on both these offenses is plain error demanding reversal of the appellant's conviction and a new trial.

POINT II

FAILURE TO GIVE AN INSTRUCTION ON SELF-DEFENSE AND DEFENSE OF HABITATION DEMANDS REVERSAL AND A NEW TRIAL SINCE APPELLANT REQUESTED SUCH INSTRUCTIONS AND APPELLANT'S OWN TESTIMONY RAISED A SELF-DEFENSE ISSUE.

Appellant contends that substantial evidence was presented at trial giving rise to an appropriate self-defense and defense of habitation instruction. Generally, the trial court is "duty-bound" to instruct on self-defense and defense of habitation when requested and appellant's own testimony raises the issue. Confusion as to the quantum of proof required for the self-defense issue has arisen frequently, but this court has held that if any substantial evidence is presented, the self-defense and defense of habitation instruction is appropriate. State v. Johnson, 112 Utah 130, 141, 185 P.2d 738 (

The trial court is obliged to give the accused's "theory of the case" to the jury if it is at all supported by the facts in evidence. United States v. Cullen, 454 F.2d 386, 390 (7th Cir. 197

Spears v. United States, 387 F.2d 698, 702 (10th Cir. 1967).

The trial judge may not weigh the evidence supporting a "the of the case" instruction, and if he declines to charge on the defendant theory of the case, he in effect directs a verdict on that issue against the defendant.

". . . If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible." Strauss v. United States, 376 F.2d 416, 419 (5th Cir. 1967).

"Even if the evidence to support the defense was 'fragile' . . . or 'weak, insufficient, inconsistent, or of doubtful credibility.' . . . it was error to refuse to give the jury the substance of Musgrave's requested instruction concerning good faith reliance on the appraisals he submitted to the Association." [Citations and footnotes omitted]. United States v. Musgrave, 444 F.2d 755, 765 (5th Cir. 1971). (Emphasis Supplied)

In considering the propriety of the denial of a favorable defense instruction on the ground that the evidence was insufficient to require it, an appellate court should view the evidence most favorably to the defendant. Richardson v. United States, 403 F.2d 574, 575 (D.C. Cir. 1968).

Where special facts present an evidentiary theory which, if believed, would defeat the factual theory of the prosecution, a theory of the case instruction must be given provided it is tendered. United States v. Leach, 427 F.2d 1107, 1113 (1st Cir. 1970).

A. SELF-DEFENSE

In State v. Vacos, 40 Utah 169, 120 P. 497 (1911), this Court noted the unharmonious decisions concerning the amount of proof required for the self-defense issue. In that case, defendant was charged with murder. The court instructed the jury that the

defendant must present a preponderance of evidence to be entitled to a self-defense instruction. The court held that the preponderance standard was error and the appropriate standard was to bring forth "some" evidence to overcome the burden. The court concluded:

> ". . . the burden is cast upon the defendant to bring forward the evidence in support of justification or excuse, but is not required to establish the justification or excuse by a preponderance of the evidence before he is entitled to avail himself of the defense." (120 P. at 502)

More recently, this court held that a requested self-defense instruction is properly refused only if evidence is so slight as to be incapable of raising a reasonable doubt while viewing the evidence in a light most favorable to the defendant. State v. Castil 23 Utah 2d 70, 457 P.2d 618 (1969).

Furthermore, the general rule in Utah specifies that it is prejudicial error to refuse to give a requested instruction if there was some evidence supporting the request. In State v. Talarico, 57 Utah 229, 193 P.860 (1920), defendant was convicted of an assault with a deadly weapon. The self-defense instruction was refused since appellant's attorney failed to timely request such instruction

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6. The court failed to give any instructions on the defense issues. Requested Ins Nos. 12 and 13 provided: (T.110-111)

"A person is justified in threatening or using force against another wh and to the extent he reasonably believes that such force is necessary to defend hi against such other's imminent use of unlawful force . . . "

"A person is justified in using force against another when and to the e that he reasonably believes the force is necessary to prevent or terminate the other's unlawful entry into or attack upon his habitation. . . "

Requested Instruction No. 16 entitled defendant to an acquittal if the is a reasonable doubt as to whether defendant acted in self defense or defense of habitation. It stated: "The defendant need not present any evidence to entitle him to an acquittal, however, if the defendant produces sufficient evidence or justification to raise a reasonable doubt as to whether the killing was justifia not he is entitled to an acquittal."

The court noted that if there is any doubt as to self-defense, it is error to refuse the instruction.

In the instant case, appellant should have been entitled to the proposed self-defense Instruction No. 12 (footnote 6, supra), since his own testimony raised the self-defense issue. Evidence at trial indicated by appellant that the appellant was accosted in his "house" (cell) without an opportunity to explain and in the pre-dawn hours when by his own testimony he was tired from a hard days work the previous day, and in the semi-conscious state of awakening from a sound sleep.

The appellant was clearly provoked by this intrusion and that, in itself, raised a reasonable doubt in Dock's mind as to defending himself when he was surprised by the pre-dawn visit from the guards.

Appellant acted in reasonable fear when he was awakened from a semi-conscious sleep in the darkness of his cell. He was shocked by this effort of the guards to take him to maximum security when he had no hearing or chance to explain his position via routine prison procedure.

The substantial evidence produced at trial and appellant's own testimony clearly falls within the Talarico rule, since some evidence raising the prospect of a reasonable doubt as to the necessity of self-defense has been raised. Under the general rules ennunciated by this Court, appellant met his burden of producing some evidence, State v. Castillo, supra. Therefore, failure to giv the requested self-defense instruction under Talarico, was prejudic error.

B. DEFENSE OF HABITATION

The defense of habitation Instruction No. 13 (footnote 2, supra), was appropriate since some evidence was produced to raise a reasonable doubt. This Court in State v. Micheson, Utah, 560 P.2 1120 (1977), discussed the policy underlying this defense. In that case defendant was convicted of second degree murder. His defense was protection of his sister's home. This Court concluded that "habitation" extends to "actual" or "substitute" residence and coul include protection of a sister's residence. The court reversed and remanded the case for failure of the lower court to give the reques

efense of habitation instruction, since Micheson submitted some vidence raising the defense of habitation issue.

The Court construed the defense of habitation statute, tah Code Ann. §76-2-405 (1953),[7] as aiming to protect person's residence and preserve the peace. This Court concluded: The policy of the statute has it's roots in the ancient and honored octrine of the common law that a man's home is his castle." 560 P.2d at 1122). Thus, "habitation" has been applied to any substitute" home in order to preserve the peace.

As a result, the defense of habitation instruction should ave been given as requested by appellant since some evidence was roduced to raise the prospect of a reasonable doubt as to the ecessity of defending his living accomodations. Under Micheson, 'habitation" would apply to appellant's cell since such was his 'substitute home". The issue was clearly raised since appellant

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. The defense of habitation as outlined in the Utah Criminal Code provides in its ntirety:

Force in defense of habitation.—A person is justified in using force gainst another when and to the extent that he reasonably believes that the force is ecessary to prevent or terminate the other's unlawful entry into or attack upon is habitation; however, he is justified in the use of force which is intended or ikely to cause death or serious bodily injury only if:

(1) The entry is made or attempted in a violent and tumultuous manner nd he reasonably believes that the entry is attempted or made for the purpose of saulting or offering personal violence to any person, dwelling or being therein and at the force is necessary to prevent the assault or offer of personal violence; or

(2) He reasonably believes that the entry is made or attempted for the urpose of committing a felony therein and that such force is necessary to prevent he commission of the felony.

testified that he feared what the security guards were going to do to him in coming to his cell after "racking the doors". His fear of being "beaten up" was reasonably based on the altercation with Officer Morrell earlier that day and appellant testified he was merely trying to prevent the unlawful entry to his home in the dark hours of the morning. Failure to give the requested instruction, therefore, when some evidence was presented, was prejudicial error under Micheson, supra, demands reversal and remand for a new trial.

CONCLUSION

One of the basic premises of the criminal law is the requirement that a particular state of mind or mens rea must be pres for criminal responsibility to attach. Appellant was charged under the Aggravated Assault by a Prisoner statute, Utah Code Ann. §76-5-103.5 (1953 as amended) (a) which manifests the legislative policy requiring a "specific intent". As a result a person should only be held criminally responsible if the state proves "each and every element" of the crime charged beyond a reasonable doubt.

The trial court refused to instruct on the essential mental element required under the aggravated assault statute by a prisoner and the lesser included offense of (simple) assault by a prisoner. This error violates all notions of the fundamental principles upon which our criminal law is based and was clearly prejudicial to appellant's rights demanding reversal and a new trial.

Similarly, the appellant was entitled the self-defense nstruction when requested since substantial evidence was presented aising the self-defense issue. A defendant in a criminal case hould be entitled to all available defenses when some evidence s presented capable of raising a reasonable doubt in the minds f the jury.

Appellant was clearly put in a defensive posture by the vents that occurred prior that day at the Utah State Prison. e had had an altercation with one of the prison guards and cted reasonably in the prison context when the prison guards suddenly wakened him from his pre-dawn sleep. It is entirely reasonable hat a prisoner would attempt to defend himself and his "home" hen a guard unexpectedly comes to his cell, and tries to pull him ut into a dark hallway to take him to maximum security when no prior earing is given which is routine prison procedure. Appellant was rightened and upset by this surprise attack upon him and was ustifiably provoked at the though of losing all freedom by being ransported to maximum security.

The self-defense and defense of habitation issues were learly raised by this series of events. As a result, failure to ive the requested instructions constituted reversible error on he part of the court below requiring reversal and a new trial.

Respectfully submitted,

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